
CANADA / JUDGMENT

R. v. Majorel

2018 BCSC 1952

COURT

Supreme Court of British Columbia

DECIDED

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2018 BCSC 1952 R. v. Majorel

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Majorel,

2018 BCSC 1952

Date: 20181107

Docket: 65066

Registry: Chilliwack

Regina

v.

Dylan Michel Majorel

Before: The Honourable Madam Justice Devlin

Reasons for Judgment

Counsel for the Crown:

J.M Doyle and

A.L. Dorin

Counsel for the Accused:

N.J. Preovolos

Place and Date of Hearing:

Chilliwack, B.C.

October 23, 25, 2018

Place and Date of Judgment:

Chilliwack, B.C.

November 7, 2018

Introduction

- [1] Dylan Michel Majorel applies to withdraw guilty pleas which he entered into on March 27, 2017, in the BC Supreme Court. In Mr. Majorel's application he argues that he was not informed about the viability of pursuing a s. 11(b) Charter remedy. In support of his application, Mr. Majorel filed an affidavit (the "Majorel Affidavit") as well as an affidavit from his previous counsel Philip Derksen (the "Derksen Affidavit").
- [2] The Crown opposes the application arguing that Mr. Majorel was fully informed of all issues relevant to the guilty pleas including unreasonable delay. In support of their position the Crown filed an Affidavit from Alyssa Fazio, legal assistant (the "Fazio Affidavit") which included email exchanges between Crown counsel and Mr. Derksen.
- [3] I heard the application on October 23, 2018, and on October 25, 2018. I dismissed the application with reasons to follow. These are those reasons.

Background

- [4] I will briefly summarize the history of this matter based on the filed affidavits, transcripts and the court record. For the purposes of this application I need not delve into the vexing details as to how or why this matter remains before the Court.
- [5] On July 21, 2013, Mr. Majorel was arrested and charged together with four others with several offences related to a July 20, 2013, break and enter at a residence in Abbotsford, BC. The matter originated in Abbotsford Provincial Court where a preliminary inquiry was held in early 2016, following an adjournment of an earlier scheduled date. Mr. Majorel and his co-accused were committed to stand trial and a jury trial was scheduled to commence on March 27, 2017.
- [6] Mr. Derksen and Crown counsel had discussions before the start of trial and reached a resolution. In an email exchange dated March 24, 2017, Crown counsel confirmed with Mr. Derksen the terms of the plea agreement:
 - 1. guilty plea to Counts 1 and 3 on Monday (March 27, 2017) in Supreme Court in Chilliwack;
 - 2. joint submission of 3.5 years;
 - 3. no outstanding issues, notably, no delay application;
 - 4. adjourn[ment] for sentencing for time the defence needs; and

5. no change in Mr. Majorel's bail status.
- [7] In the March 27, 2017 appearance before Madam Justice Brown, Mr. Derksen advised the Court that Mr. Majorel wished to re-elect to be tried by judge alone and enter guilty pleas to Count 1 on the Indictment, of break and enter contrary to s. 348(1)(d) of the Criminal Code, R.S.C. 1985, c. C-46 [Code] and Count 3, using an imitation firearm while committing the break and enter contrary to s. 85(2) of the Code. Prior to accepting the guilty pleas Brown J. canvassed the matters enumerated in s. 606(1.1) of the Code to ensure that Mr. Majorel's plea was one that was informed, voluntary and unequivocal. Mr. Majorel responded to each inquiry in the affirmative and Brown J. accepted the guilty pleas. At Mr. Derksen's request, the sentencing hearing was adjourned until June 26, 2017.
- [8] On June 16, 2017, the Supreme Court of Canada released the decision in *R. v. Cody*, 2017 SCC 31 [Cody] dealing with unreasonable delay. According to the Derksen Affidavit, the release of this decision caused Mr. Derksen to question his earlier assessment of the issue of delay and its implication for Mr. Majorel's case. Mr. Derksen decided to obtain an opinion from Mr. Preovolos as to the impact of Cody on Mr. Majorel's case. Mr. Preovolos prepared a letter which Mr. Derksen provided to Mr. Majorel. According to the Derksen affidavit, Mr. Majorel then instructed him to pursue a Charter remedy based on unreasonable delay. Before the June 26, 2017, sentencing date, Mr. Derksen advised the Crown of Mr. Majorel's intention to pursue a delay application. According to the Derksen affidavit, he thought he should get off the record and have Mr. Majorel apply to strike his plea but the Crown did not agree. I pause to note that at the hearing before me both parties agreed that the Cody decision did not in any way alter the earlier Supreme Court of Canada decision in *R. v. Jordan*, 2016 SCC 27 [Jordan].
- [9] On October 2, 2017, Mr. Derksen filed a Notice of Application on behalf of Mr. Majorel seeking relief under s. 24(1) of the Charter due to a breach of his s. 11(b) Charter right. In late November or early December 2017, when Mr. Derksen received the Crown's authorities (presumably in response to the October 2, 2017, Notice of Application) he was made aware of the Crown's position that the guilty plea precluded Mr. Majorel from pursuing a delay application. At some point, Mr. Derksen advised Mr. Majorel that he should change counsel. The delay application was scheduled to be heard on October 23 and 24, 2017. For reasons that have not been fully explained to me that hearing did not proceed and the matter was eventually scheduled for hearing on October 23, 2018. Ironically, Mr. Majorel's delay application was itself delayed for one year.
- [10] On October 23, 2018, I was advised that in addition to the delay application Mr. Majorel also intended to apply to withdraw his guilty pleas although no actual notice of such application was filed with the registry. It was apparent from submissions that counsel for the Crown was aware of the second application and agreed that Mr. Majorel's application to withdraw his guilty pleas should be determined before proceeding to the delay application.

Summary of the Evidence

- [11] The Majorel Affidavit states that Mr. Majorel was not aware of the "significance of delay" at the time he entered his guilty pleas and had he known he would not have pleaded guilty.
- [12] In the Derksen Affidavit, Mr. Derksen states he considered the issue of delay and a remedy under s. 24(1) of the Charter and was aware of the Jordan decision at the time he canvassed the issue of entering into a plea with his client. Mr. Derksen was of the view that a delay application was unlikely to be successful. Paragraphs 6 and 7 of the Derksen Affidavit sets out the advice he provided:

Before Mr. Majorel pleaded guilty I gave him advice about the strength of the Crown's case and the likelihood of conviction after trial. We discussed possible violations of his rights pursuant to the Charter of Rights and Freedoms which occurred in the search of his residence in Chilliwack as well as various identification issues. I believe the issue of delay was discussed between us, but only in passing as we discussed a variety of issues. In particular, I advised him that the Crown's sentencing position on a guilty plea was considerably more favourable than it would be on conviction after trial.

I further advised him that the Crown had a strong case against him and that there was a reasonably strong possibility he would be convicted.

- [13] The Derksen Affidavit also states that after the Supreme Court of Canada released the decision in Cody in June 2017, he became concerned about his earlier opinion and sought another opinion and provided it to Mr. Majorel. When he then received instructions from Mr. Majorel to pursue Charter relief based on unreasonable delay he advised the Crown and subsequently withdrew from the record. The legal opinion was provided by Mr. Preovolos who is Mr. Majorel's current counsel.

Cross-examination of Mr. Majorel

- [14] The Crown's application to cross-examine Mr. Majorel on his affidavit was not opposed and I granted his request. I will set out the pertinent portions of Mr. Majorel's testimony.
- [15] Mr. Majorel agreed that when he entered his guilty pleas he was aware of the terms of the plea offered from the Crown. He was aware that discussions had taken place between the Crown and Mr. Derksen and was aware of the terms of the agreement. He also acknowledged that he knew there would be a joint submission for a sentence much less than the five to eight years sentence imposed after trial.
- [16] Mr. Majorel also agreed that he decided to plead guilty after discussing the case with his counsel.
- [17] Mr. Majorel's evidence regarding what he knew about delay vacillated between a claim that he knew nothing about delay until he received Mr. Preovolos' letter, to a claim that he himself was the one who first raised the issue of delay with Mr. Derksen after learning about

the issue from "friends or something". However, when he was presented with an excerpt of the January 26, 2016, appearance in Provincial Court, where his application to adjourn the preliminary inquiry was denied out of concern for delay by the Court, he acknowledged that in his experience there were always delays but that did not always justify bringing a delay application. I assume from Mr. Majorel's testimony that while he was aware that there were delays in the process, this did not always have an impact on his case.

- [18] Mr. Majorel asserted that the issue of delay was never canvassed by his counsel. However, he qualified this by stating that it was never really discussed other than perhaps five to ten minutes or seconds in "passing". However, when pressed for details about the nature of his discussion with counsel, Mr. Majorel revealed that he himself raised the topic of delay after learning about the issue from "friends or something". When pressed for further details about the information he received from "friends or something", Mr. Majorel could not recall and his answer was very evasive, explaining that he may have read it on the internet or Facebook, social media or seen it on TV. While I have serious doubts about Mr. Majorel's testimony regarding the source of his knowledge about delay, his testimony does confirm that regardless of the source, Mr. Majorel did discuss delay with Mr. Derksen before entering into his guilty pleas and he was advised by Mr. Derksen that a remedy for delay was not an option.
- [19] Mr. Majorel was shown a series of email correspondence between Crown counsel and Mr. Derksen days leading up to the March 27, 2017, court appearance including an exchange on March 24, 2017, in which Mr. Derksen writes to the Crown "that's correct", in response to the following list of terms of the final agreement:
1. Guilty plea to Counts 1 and 3 on Monday in Supreme Court in Chilliwack.
 2. Joint submission of 3.5 years.
 3. No outstanding issues, notably, no delay application.
 4. Adjourn[ment] for sentencing for the time you need.
 5. I will not be seeking to change bail status in any way.
- [20] Despite his earlier testimony that he had raised the topic of delay with Mr. Derksen, Mr. Majorel maintained that he was not aware that item three which identified that there was no delay issue, formed part of the agreement.
- [21] He disagreed with the suggestion that he deliberately omitted that fact that he had raised the topic of delay with Mr. Derksen in his affidavit because he knew it would undermine his application.

ISSUE

- [22] The sole issue on this application is whether Mr. Majorel's guilty pleas were informed. More specifically, did Mr. Majorel discuss the option of seeking a remedy for unreasonable delay with Mr. Derksen before he entered into his guilty pleas.

analysis

- [23] The legal principles that govern this application are not in dispute. A valid guilty plea is one that is informed, voluntary, and unequivocal: *R. v. Wong*, 2018 SCC 25 [Wong]; *R. v. Hexamer*, 2018 BCCA 142 at para. 70; *R. v. Alec*, 2016 BCCA 282 at para. 70.
- [24] In *Wong*, the Supreme Court established that a guilty plea may be withdrawn if the accused shows that (1) he or she was not aware of a legally relevant collateral consequence; and (2) there is a reasonable possibility he or she would have proceeded differently if properly informed of that consequence. The analysis is subjective and focused on how the accused would have proceeded. However, a court is not obliged to automatically accept an accused's claim, and should look to objective circumstantial evidence to test their veracity against a standard of reasonable possibility: at para. 26.
- [25] Mr. Majorel's principal submission is that his guilty pleas were uninformed because he was never made aware of the possibility he could pursue a remedy for unreasonable delay. In his affidavit, Mr. Majorel states that he was not made aware of the opportunity to seek a remedy for delay until after he had entered his guilty pleas and only because he was provided a letter from his counsel which contained a second opinion regarding the delay issue. Further, in his affidavit, he states he would not have entered the guilty pleas if he knew he had the option of advancing an unreasonable delay argument. Counsel for Mr. Majorel submits that his testimony in cross-examination was consistent with his affidavit in that he only discussed two options with his lawyer - go to trial or enter guilty pleas.
- [26] Further, counsel for Mr. Majorel urges me to give little weight to the Derksen Affidavit because it lacks particulars. There are no supporting notes or correspondence and the language used is circumspect. Much of his criticism focuses on the language used in the Derksen Affidavit. I do not agree with the suggestion that the Derksen Affidavit is unsubstantiated or supports Mr. Majorel's position. I find ample corroboration for Mr. Derksen's statements about the scope of his legal advice in the email exchanges attached to the Fazio Affidavit. The emails establish that on March 16, 2017, Mr. Derksen identified trial delay as an issue to be canvassed at trial and that he was prepared to discuss a resolution with his client if the Crown had a solid position. I find that these emails support the paragraphs in the Derksen Affidavit where he states he considered delay and it was only one of the issues he discussed with his client before entering into the plea.
- [27] Most importantly, in the email exchange dated March 24, 2017, (which was the Friday before the Monday scheduled court appearance), Crown counsel and Mr. Derksen confirmed the terms of the plea agreement which included acknowledging that there were no delay

applications. There is nothing before me that leads me to believe that Mr. Derksen did not uphold his ethical duty to canvass all aspects of the plea agreement with Mr. Majorel to ensure that the decision to plead guilty was entirely Mr. Majorel's personal and ultimate choice. (For support for this proposition see Wong at para. 2)

- [28] I find that Mr. Majorel's application fails for a number of reasons. Firstly, he admitted in cross-examination that not only was he aware of the delay issue before he entered his guilty plea, but that he was the one who raised the issue with Mr. Derksen. Although Mr. Majorel conveniently fails to recall any details including whether they discussed the issue for five seconds or five minutes, there is simply no support for his claim that he was unaware of the issue before he entered his guilty pleas. In my view, this admission by Mr. Majorel is sufficient to establish that his decision to enter guilty pleas was informed.
- [29] Secondly, the excerpts from transcripts of the appearances in Provincial Court reveal that the issue of delay was canvassed on more than one occasion. This included when Mr. Majorel applied for an adjournment of the preliminary inquiry in 2016. The judge at this preliminary inquiry explicitly addressed the delay issue in rejecting Mr. Majorel's application to adjourn the preliminary inquiry that had been set for the second time. During his cross-examination, Mr. Majorel explained that he did not understand that the reference to delay at the preliminary inquiry was in reference to the same issue made at the time of his plea. This is simply nonsense. Mr. Majorel's criminal record was filed as an exhibit in these proceedings and establishes that he is someone who has experience with the criminal justice system. His testimony confirms his familiarity with the system and its procedure generally. He was not a stranger to the criminal courts. Accordingly, it would have been obvious to Mr. Majorel that the issue of delay does not take on different meanings in different contexts of the same criminal case. Indeed, this evidence alone establishes that Mr. Majorel was made aware of a possible delay issue to be raised in 2016.
- [30] Thirdly, the email exchanges between Mr. Derksen and Crown counsel supports paragraphs 6 and 7 of the Derksen Affidavit where Mr. Derksen states that he provided Mr. Majorel with advice and options. The March 24, 2017 email confirms all aspects of the plea agreement, which as previously mentioned, refers to the ethical obligation recognized in Wong. This gives rise to the implication that Mr. Derksen duly brought up and discussed the issue of delay with Mr. Majorel by that date.
- [31] I am satisfied that Mr. Majorel made a fully informed decision to enter his guilty pleas. He was made aware of the delay concern during his preliminary inquiry and the issue of trial delay was already canvassed with his counsel before Mr. Majorel's decision to enter a guilty plea. Indeed, I find that by March 24, 2017, when Mr. Derksen confirmed the plea agreement with Crown counsel, Mr. Derksen had already discussed the option of pursuing an unreasonable delay application with Mr. Majorel. Mr. Majorel was fully informed of the consequence of his guilty pleas and he made an informed choice when he accepted the plea agreement.

[32] Mr. Majorel entered into his guilty pleas voluntarily, informed and unequivocally. I find that the basis for Mr. Majorel's application is not that he was uninformed about the unreasonable delay and any possible remedy but that he preferred the opinion of Mr. Preovolos over that of Mr. Derksen. Guilty pleas are not to be interfered with lightly. Preferring a second opinion after the fact is an insufficient reason to set aside the guilty pleas.

[33] Mr. Majorel's application to withdraw his guilty pleas is dismissed.

"Devlin J."

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